LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
DEC 16 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. ~~339~~ 75

STELLA HUGHES, *Petitioner*,

v.

STATE OF WASHINGTON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

JOHN J. O'CONNELL
Attorney General,

HAROLD T. HARTINGER
JAMES C. HANKEN
Assistant Attorneys General,

Counsel for Respondent.

Temple of Justice, Olympia, Washington 98501
Telephone 753-5318, Area Code 206

STATE PRINTING PLANT, OLYMPIA, WASH.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. 339

STELLA HUGHES, *Petitioner,*

v.

STATE OF WASHINGTON, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

JOHN J. O'CONNELL
Attorney General,

HAROLD T. HARTINGER
JAMES C. HANKEN
Assistant Attorneys General,

Counsel for Respondent.

Temple of Justice, Olympia, Washington 98501
Telephone 753-5318, Area Code 206

355

INDEX

CITATIONS

Page

Cases:

Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935) . 11
County of St. Clair v. Lovingston, 32 Wall. 46 (1874) 9
Coyle v. Oklahoma, 221 U.S. 559 (1911) 8
Hardin v. Jordan, 140 U.S. 371 (1891) 8
Hughes v. Washington, 67 Wn.2d 799, 410 P.2d 20 (1966) 3
Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893) 10
Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833 (1909) 10
McGilvra v. Ross, 215 U.S. 70 (1909) 8
Mann v. Tacoma Land Co., 153 U.S. 273 (1894) . 8
Pollard v. Hagan, 3 How. 212 (1845) 8
Port of Seattle v. Oregon & Wash. R.R., 255 U.S. 56 (1921) 8, 10
Shively v. Bowlby, 152 U.S. 1 (1894) 8
United States v. Washington, 294 F.2d 830 (9th Cir. 1961) 6
Water Power Co. v. Water Comm'rs, 168 U.S. 349 (1897) 9, 10
Western Pac. Ry. v. Southern Pac. Co., 151 Fed. 376 (9th Cir. 1907) 9

Statutes and Constitutions:

Rev. Code Wash. ch. 26.16 7
Rev. Code Wash. ch. 64.28 7
U.S. Const. art. 4, § 3, cl. 2 6
Wash. Laws of 1961, ch. 2 7
Wash. Terr. Laws of 1862, p. 83, § 1 5
Wash. Terr. Laws of 1877, p. 3, § 1 5
Wash. Terr. Code of 1881, § 1 5

Miscellaneous:

Griffith, Joint Tenancy and Community Property, 37 Wash. L. Rev. 30 (1962) 7

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. 339

STELLA HUGHES, *Petitioner*,

v.

STATE OF WASHINGTON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The petition for certiorari seeking review of *Hughes v. State of Washington*, 67 Wn.2d 799, 410 P.2d 20 (1966), raises two questions (*Brief in Opposition*, p. 6):

1. Whether the State of Washington by its constitution may abolish an upland owner's common law riparian right to acquire future title to adjoining tidelands by accretion where title to the upland

owner's property is deraigned from a United States patent issued prior to statehood?

2. Whether the designation by the Washington Constitution of the *line of ordinary high tide* as the boundary of tidelands (rather than the line of mean high tide as defined by the U. S. Coast & Geodetic Survey) is invalid as to tidelands adjoining upland property, title of which is deraigned from a United States patent issued prior to statehood?

The Solicitor General has filed a *Memorandum for the United States as Amicus Curiae* in response to the Court's order of October 10, 1966. The government's remarks appear to be limited to question No. 1. The State of Washington submits this brief in reply to the government's assertion that the first question merits review by this Court.

INTRODUCTION

Prior to the date of Washington's statehood the United States gave its patent to uplands bordering the Pacific Ocean to the petitioner's predecessor in interest.[1] Thereafter, both before and after the date of statehood, imperceptible accretions formed along the shore in front of the property. *Pet. App.* 60. The record does not disclose the extent of the accreted land formed between the date of the patent and the date of statehood, but the record does show that 175

[1]The patent was not put in evidence. However, to dispel any inference that the government by the patent purported to convey a "vested right to an ambulatory seaward boundary," *Memorandum* p. 9, we have set the patent out in full in Appendix A, *infra*, pp. 12-13.

feet of accreted land has formed since the date of statehood.[2] *Pet. App.* 63.

The state made no claim to the accreted land formed prior to statehood. *Pet. App.* 60. Title to this land vested in the original patentee and his successors as the land was formed, all in accordance with the common law in effect prior to the adoption of the Washington Constitution. See Wash. Terr. Laws of 1862, p. 83, § 1; Wash. Terr. Laws of 1877, p. 3, § 1; Wash. Terr. Code of 1881, § 1.

The state did claim the accreted lands formed since statehood. It did so on the ground that the applicable law for this period was *state law* that had modified the common law doctrine of accretion. *Pet. App.* 41-49. The Washington Supreme Court agreed with this contention, holding that the Washington Constitution had abolished all common law riparian rights of lands bordering upon navigable waters—including the riparian right to future accretions. (Our short summary of this feature of Washington law will be found in our *Brief in Opposition*, pp. 6-7.)

---

[2]The *Memorandum for the United States*, p. 2, unfortunately leaves the impression that "some 560" feet of accreted land was formed after statehood. This is not so. Examination of the Court's diagram (*Pet. App.* 63) shows that ownership of 386 of the total 561 feet of property in dispute depends upon the determination of question No. 2.

REPLY TO THE GOVERNMENT

1. The United States urges review of the decision below because of the impact it may have on the government's extensive land holdings in the State of Washington. *Memorandum*, pp. 2-6. We therefore think it is important to note an exception to the Washington rule that the riparian right to future accretions is not a right good as against the State of Washington's title to tidelands.

In deference to the views of the Ninth Circuit Court of Appeals in *United States v. Washington*, 294 F.2d 830 (1962), the Washington Supreme Court acknowledged that the constitutional abolition of the riparian right does not apply to the public domain of the United States. *Pet. App.* 82-83. It becomes effective only after the United States parts with title. In such cases, therefore, the seaward boundary of the lands would become fixed as of the date of the government's conveyance, not as of the date of statehood.

The theoretical basis for the distinction arises, of course, from the property clause of the federal constitution which gives Congress the power to make "all needful Rules and Regulations" respecting property belonging to the United States. U.S. Const. art. 4, § 3, cl. 2. The moving boundary rule, being applicable law prior to statehood, remains applicable law after statehood because Congress has not acted to change it.

2. We disagree with the government's statement that, "The precise question considered by the courts below and presented by the petition here is whether the physical limits of property conveyed under a federal patent can be altered by State law." *Memorandum*, p. 6. The state has never contended, and no court below has held, that the state constitution operates to divest any owner of accreted land, title to which has vested before statehood under the law applicable at the time the accretion was formed. The state fixed boundary rule merely operates to extinquish the upland owner's common law right to acquire future title to lands not yet formed. Indeed, we would suppose that not even Congress could alter the physical limits of property already conveyed under a federal patent.

There is nothing startling in the assertion by the State of Washington that it can modify the common law incidents of real property ownership. Prior to the adoption of Initiative Measure No. 208 in 1961, Washington did not recognize joint tenancies in real property. Wash. Laws of 1961, ch. 2 (ch. 64.28 Rev. Code Wash.). Even now the incidents of joint tenancy are not necessarily the same as the common law incidents. See. *e.g.*, Griffith, *Joint Tenancy and Community Property*, 37 Wash. L. Rev. 30-43 (1962). Similarly, Washington has never recognized the common law incidents of real property ownership by husband and wife. This state, instead, adopted the community property concept from the Spanish law. Ch. 26.16 Rev. Code Wash.

It cannot be seriously argued that these laws, being changes in the common law, are not operative because all real estate in Washington was once owned by the federal government. They, like any number of other changes in the common law of real property, are nothing more than an exercise by the state of its inherent power to enact law.

3. When Washington was admitted to the Union as a state it became owner of all tidelands within its boundaries. Its ownership was not by grant or conveyance from the federal government but arose entirely as an incident of state sovereignty. *Pollard v. Hagan*, 3 How. 212, 230 (1845). We see nothing in this fact to sustain the government's argument, *Memorandum*, pp. 7, 9, that the state is therefore powerless to modify the common law moving boundary rule as to these tidelands.

On the contrary, under the doctrine of *Pollard v. Hagan* the state must be admitted on an equal footing with the original thirteen states, *Coyle v. Oklahoma*, 221 U.S. 559, 567 (1911), and is therefore guaranteed the same rights as the original states in controlling the rights and incidents in tidelands. *Hardin v. Jordan*, 140 U.S. 371, 382 (1891); *Shively v. Bowlby*, 152 U.S. 1, 40 (1894); *Mann v. Tacoma Land Co.*, 153 U.S. 273, 283-84 (1894); *McGilvra v. Ross*, 215 U.S. 70, 79 (1909); *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56, 63 (1921).

Unless this Court is going to hold that the orig-

inal thirteen states are barred from adopting a fixed boundary rule for their tidelands, there is no basis for denying to the State of Washington this right as to its tidelands.[3] Of course neither the original thirteen states nor the State of Washington can modify the common law retroactively. Both must take the tideline boundary as it exists on the day the law is made, and this is what Washington has done, as we have seen, *supra*, pp. 5, 7.

4. When the government issues a land patent there is no principle of federal law that raises the common law incidents of riparian ownership to the status of immutable attributes of the title acquired, forever free from the possibility of change by the state. In fact, just the opposite is true. This Court long ago ruled, *Water Power Co. v. Water Comm'rs*, 168 U.S. 349, 363 (1897):

> It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bound by the States.

It therefore is not possible to construe the patent to

---

[3] At this point we note parenthetically that the Court has in the past referred to the right of "future accretion" as vested. See *County of St. Clair v. Lovingston*, 32 Wall. 46, 68 (1874). But the case has never been understood as holding that the common law once adopted may never be later modified, *e.g.*, *Western Pac. Ry. v. Southern Pac. Co.*, 151 Fed. 376, 399-400 (9th Cir. 1907) and cases cited, because the Court's statement was intended only to meet the argument that specific federal patents were to be construed as conveying property of fixed limits as under the *agri limitati* of civil law.

petitioner's predecessor in interest as an attempt by the government to convey a vested right to an ambulatory seaward boundary,[4] as the United States suggests, *Memorandum*, pp. 3, 9, 10.

We can emphasize our point by reference to the common law incidents of riparian ownership that are left to state determination. *First*, a state can deny or permit, or permit on terms of its own choosing, access to navigable water. *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56, 64 (1921), citing with approval *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833 (1909). *Second*, a state can determine the use riparians may make of the water that flows by their property. *Water Power Co. v. Water Comm'rs*, *supra*. *Third*, the government concedes that a state may abolish the riparian right to wharf out and fill. *Memorandum*, p. 8.

If a state has complete freedom to do as it chooses with regard to the rights that make waterfront ownership valuable—rights of access, use of the water, wharfage, etc.—what reason is there for doubting its power to modify the common law accretion rule? Clearly the important consideration underlying the accretion rule is to protect the basic rights of access and use of navigable waters. See *Lamprey v. State*, 52 Minn. 181, 53 N.W. 1139, 1142 (1893). It must follow therefore that the right to

[4] If the right were vested by the patent there is no explanation for the government's concession that the patentee has no right to have future accretions occur or to forestall its prevention, as occurs, for example, when the state fills tidelands artificially.

future accretions hardly qualifies as an "*essential* basis of right" (emphasis ours) under a federal patent within the meaning of *Borax, Ltd. v. Los* Angeles, 296 U.S. 10 (1935).

CONCLUSION

For the foregoing reasons we urge the Court to deny the petition for certiorari despite the recommendation of the United States.

Respectfully submitted,

JOHN J. O'CONNELL
Attorney General,

HAROLD T. HARTINGER
JAMES C. HANKEN
Assistant Attorneys General,

Counsel for Respondent.

December 1966

APPENDIX A

THE UNITED STATES OF AMERICA,

CERTIFICATE
No. 455

To all to whom these presents shall come, Greeting:

WHEREAS, *Edwin G. Loomis, of Pacific County, Washington Territory* has deposited in the GENERAL LAND OFFICE of the United States, a Certificate of the REGISTER OF THE LAND OFFICE at *Vancouver* whereby it appears that full payment has been made by the said *Edwin G. Loomis*, according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of the Public Lands," for *the Lots numbered Three and Four of Section Four in Township Eleven, North of Range Eleven West, in the District of Lands subject to sale at Vancouver, Washington Territory containing fifty nine Acres and fifty hundredths of an acre*, according to the official plat of the Survey of the said Lands, returned to the General Land Office by the SURVEYOR GENERAL, which said tracts have been purchased by the said *Edwin G. Loomis.*

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several acts of Congress in

such cases made and provided, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said *Edwin G. Loomis* and to *his* heirs, the said tract above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereto belonging, unto the said *Edwin G. Loomis* and *his* heirs and assigns forever.

IN TESTIMONY WHEREOF, I *Andrew Johnson*, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these Letters to be made PATENT, and the SEAL of the GENERAL LAND OFFICE to be hereto affixed.

GIVEN under my hand, at the City of Vancouver, the *second* day of *July*, in the year of our Lord one thousand eight hundred and *sixty six* and of the INDEPENDENCE OF THE UNITED STATES the *ninetieth*.

BY THE PRESIDENT: *Andrew Johnson*

By *Edw. D. Neill*
Secretary

J. H. Grainger
Recorder of the
General Land Office